

THE LDS CHURCH, PROPOSITION 8, AND THE FEDERAL LAW OF CHARITIES

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In the days before and after the passage of California's "Proposition 8," a ballot initiative barring legal recognition of same-sex marriages in the state, it was widely reported that the LDS Church, together with other religious organizations, played a significant role in supporting the initiative.¹ National attention peaked with a *New York Times* report detailing some of the church's efforts, which included e-mails to members imploring them to donate money to "Yes on 8" organizations as well as other logistical support for proponents of the measure.² Gay rights advocates and others have now called for an investigation of the Church's activities, arguing that they violate federal restrictions on political activities by tax-exempt charities.

This Essay considers the merits of the argument that the Mormon Church's support for Proposition 8 violated federal tax law. I take as given the facts reported by the *New York Times* and other major news outlets. Although the facts are not really in dispute, much of the underlying law is. There are few clear guidelines governing lobbying by charities. In the end it is impossible to say whether the Church's conduct will have any tax-law repercussions. My conclusion that there is uncertainty, though, stands in contrast with existing claims that the expenditures of the LDS Church and others are clearly unproblematic.

My discussion here is also aimed at revealing some of the weaknesses of the law of charities. In particular, the Proposition 8 episode exposes a serious hole in the fabric of the federal law: the possibility that massive, multi-million dollar lobbying expenditures, large enough to swamp any opposition, may be perfectly legitimate, so long as they are undertaken by a sufficiently gigantic organization. It is hard to see a good justification for a rule that would, in effect, grant political influence only to the largest charities, but that seems to be one plausible interpretation of current law (albeit

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¹ In this paper, I will use the terms "Mormon" and "LDS" interchangeably to refer to the Church of Jesus Christ of Latter-day Saints.

² Jesse McKinley & Kirk Johnson, *11th-Hour Effort Saved Same-Sex Marriage Ban On California Ballot*, N.Y. TIMES, Nov. 15, 2008, at A1 (link).

an interpretation I argue against here). Further, recent events show that the IRS so far has failed to grapple with the most important questions surrounding the rules against lobbying, such as the problem of how to value the use of mailing lists, websites, e-mail, and phone trees—tools that now are central to modern politics.

Part I of the Essay sets out the background rules governing charities. Part II explains how these rules, as interpreted to date, lead to fairly inconclusive results in the Prop 8 scenario, largely because of valuation problems and uncertainty about the extent of permissible activities for large organizations. Part III presses more closely towards a thorough understanding of the political-activity laws, arguing that the two best candidates for the purposes underlying those laws both suggest that the LDS Church's expenditures should be problematic.

I. FEDERAL LIMITS ON "SUBSTANTIAL" POLITICAL ACTIVITY BY CHARITIES

Churches and other forms of charity are generally exempted by § 501(c)(3) of the Tax Code from the federal tax on the income of corporations. Section 170 of the Code also allows individuals who make contributions to those organizations to deduct some or all of their contribution on their federal income tax return. It is this eligibility to receive deductible contributions that distinguishes (c)(3)'s from so-called "noncharitable" nonprofit organizations, many of whom also are exempt from federal corporate income tax. Qualifying as a 501(c)(3) also often results in additional state tax benefits.³

In order to obtain the extra goodies that come with (c)(3) status, a would-be charity must abide by a set of additional requirements over and above those faced by other nonprofits. Most pertinently for our purposes, "no substantial part" of a charity's activities can consist of "propaganda, or otherwise attempting, to influence legislation."⁴ Similarly, a charity must forfeit its exemption if it carries on one or more "substantial" nonexempt purposes such as running an unrelated for-profit business.⁵

³ John D. Colombo, *Federal and State Tax Exemption Policy, Medical Debt and Healthcare for the Poor*, 51 ST. LOUIS U. L.J. 433, 436, 439–44 (2007), available at http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID997068_code253723.pdf?abstractid=997068&mirid=1 (link).

⁴ I.R.C. § 501(c)(3) (2006) (link); Treas. Reg. § 1.501(c)(3)-1 at (b)(3)(i) (2008). This prohibition is sometimes confused with (and in fact at times overlaps with) the absolute bar on any charitable "participation" in a campaign for elective office. See *id.* at (b)(3)(ii). "Legislation" includes both ballot initiatives and constitutional amendments; there is no question that Proposition 8 falls within the IRS's interpretation of the scope of the statute. See e.g., Treas. Reg. § 56.4911-2(b)(1)(iii) (2008).

⁵ See *Better Business Bureau of Washington, D.C., Inc. v. United States*, 326 U.S. 279, 283 (1945). In fact, the statute directs that a (c)(3) must be dedicated "exclusively" to its charitable purpose. The *Better Business Bureau* Court, however, apparently read this language to include an implicit *de minimis* exception for insubstantial amounts of commercial activity. See *id.* ("[T]he presence of a single non-

There is no clear law on what comprises a “substantial” amount of lobbying. In the leading cases upholding IRS decisions to revoke (c)(3) status, the offending charity either engaged in pervasive lobbying, or could not achieve any of its ends except through lobbying.⁶ Because it was obvious in all of those instances that the lobbying was more than insubstantial, we have little guidance about how to decide closer cases.⁷ Conversely, in the leading case in which a court rejected the IRS’s determination, less than “5% of the time and effort” of the organization was devoted to lobbying.⁸

The rules for determining what amounts to “substantial” commercial activity are somewhat more clear-cut. The Tax Court, a federal trial court with jurisdiction to decide tax disputes, has held that a charity whose non-exempt expenditures were about 10% of its total revenues was not engaging in a “substantial” amount of commercial activity.⁹ That is, if an organization brings in \$100,000, it can spend up to \$10,000 on noncharitable activities without losing its exemption. Later cases have emphasized that this 10% figure is not an absolute safe harbor, however.¹⁰ It also is uncertain whether the Supreme Court, which first crafted the “substantial” commercial activity language, would read that term to have the same meaning in the context of lobbying activities.¹¹

Some charities can escape much of this uncertainty by electing into a more definite set of rules under Tax Code § 501(h). The 501(h) election permits an organization to make lobbying expenditures without fear of penalty so long as the organization stays below its statutory expenditure cap.¹² The cap increases in proportion to the charity’s revenues, but maxes out at

educational purpose, *if substantial in nature*, will destroy the exemption regardless of the number or importance of truly educational purposes.”) (emphasis added).

⁶ See *Christian Echoes Nat’l Ministry v. United States*, 470 F.2d 849, 855–56 (10th Cir. 1972); *Kuper v. Comm’r*, 332 F.2d 562, 563 (3d Cir. 1964); *Haswell v. United States*, 500 F.2d 1133, 1146–47 (Ct. Cl. 1974); see also Rev. Rul. 62-71, 1962-1 C.B. 85 (holding that organization that could attain its purposes only through lobbying was not charitable).

⁷ The *Haswell* court did note, though, that an allocation of 20% of the organization’s expenditures to lobbying was also a significant factor in its finding that the charity engaged in “substantial” lobbying. 500 F.2d at 1146.

⁸ *Seasongood v. Comm’r*, 227 F.2d 907, 912 (6th Cir. 1955). The IRS has also mentioned time and effort of an organization’s staff as one factor it considers in weighing substantiality. I.R.S. Gen. Couns. Mem. 38,437 (July 8, 1980), 1980 WL 131447.

⁹ *World Family Corp. v. Comm’r*, 81 T.C. 958, 967 (1983).

¹⁰ *E.g.*, *Manning Ass’n v. Comm’r*, 93 T.C. 596, 610–11 (1989). Indeed, in the political context, courts have emphasized that a “percentage test” does not fully capture the necessary analysis. *E.g.*, *Christian Echoes*, 470 F.2d at 855 (citing *Seasongood*, 227 F.2d 907). These courts have not elaborated on what they see as deficient about the percentage approach. I suggest below some of the problems of the raw numerical method; these sorts of difficulties, if not the precise ones I point to, are likely what has driven the courts’ intuitions.

¹¹ One point that would support identical interpretations for both provisions is that the political-limitations language was originally a codification of an earlier appellate court decision, which itself was an interpretation of the “exclusively” charitable requirement. *Haswell v. United States*, 500 F.2d 1133, 1140–41 (Ct. Cl. 1974) (citing *Slee v. Comm’r*, 42 F.2d 184 (2d Cir. 1930)).

¹² I.R.C. § 501(h)(1), (3) (2006).

\$1 million no matter the size of the organization.¹³ Importantly, churches cannot make a 501(h) election.¹⁴ However, as I will argue, it is possible that the structure of § 501(h) has implications for the proper interpretation of “substantial” even for nonelecting charities.

II. PROPOSITION 8 AND THE VALUATION PROBLEM

How, then, do these rules play out in the context of the Proposition 8 controversy? The reported facts seem not to be in dispute. The LDS Church leadership announced its support for Proposition 8 in a letter that was to be read in every Mormon congregation, in which leaders strongly intimated that church members should donate time and money to supporting Proposition 8.¹⁵ During the weeks leading up to the vote, church officials took part in a satellite broadcast “discussing the LDS Church’s doctrine of marriage and describing the church’s participation in the Protect Marriage Coalition, which wants voters to approve the initiative.”¹⁶ The broadcasters urged viewers to contact “friends, family and fellow-citizens in California” and encourage them to support the initiative.¹⁷ The Church reportedly “tapped every resource, including the church’s built-in phone trees, e-mail lists and members’ willingness to volunteer and donate money.”¹⁸ It also ran a website—preservingmarriage.org, labeled an “official website” of the Church—with content including videos supporting the ban.¹⁹ The Church’s support paid off, as both sides estimated that about half of the \$40 million spent in support of Prop 8 came from Mormons.²⁰

As a threshold matter, there is little doubt that many of these activities constitute “lobbying” as the IRS has interpreted that term. Charities may disseminate “nonpartisan” and “objective” information about pending legislation, but statements that express only one side of a controversial issue do

¹³ *Id.* § 4911(c) (link).

¹⁴ *Id.* § 501(h)(5).

¹⁵ McKinley & Johnson, *supra* note 2, at A1 (reporting that Church leadership issued “four-paragraph decree to be read to congregations . . . urging members to become involved with the cause”). The Church has posted the letter at <http://newsroom.lds.org/ldsnewsroom/eng/commentary/california-and-same-sex-marriage> (link).

¹⁶ Peggy Fletcher Stack, *LDS Call to Ban Gay Marriage Widens: Church is Wooing Californians to Support Proposition 8*, SALT LAKE TRIBUNE, Oct. 8, 2008, available at 2008 WLNR 19121139. As of this date, the segments of the video remain available on-line at <http://www.newsroom.lds.org/ldsnewsroom/eng/news-releases-stories/church-readies-members-on-proposition-8> (last visited Jan. 15, 2009) (link).

¹⁷ *Id.*

¹⁸ Peggy Fletcher Stack, *Prop 8 Divides LDS Church Faithful: Church’s Campaign Against Gay Marriage is its Most Vigorous Effort Since 1970’s*, SLTRIB.COM, Oct. 24, 2008, available at 2008 WLNR 20269991 (published online with the Salt Lake City Tribune).

¹⁹ Jesse McKinley, *Inquiry Set on Mormon Aid for California Marriage Vote*, N.Y. TIMES, Nov. 26, 2008, at A21.

²⁰ McKinley & Johnson, *supra* note 1, at A1.

not qualify.²¹ It is not clear from reported accounts who made use of the Church's e-mail and phone lists—that is, whether the Church itself made calls and e-mails, or instead shared those lists with the organizations leading the Proposition 8 charge. That, however, probably makes no difference. Providing services for free or at discount to others who are engaged in lobbying is likely itself lobbying; the Treasury has said as much in regulations issued to implement § 501(h), and there is no obvious reason the rule would be different for nonelecting organizations.²² Otherwise charities could easily escape the lobbying limits by use of a simple shell entity.

The difficult question, then, is whether together the Church's activities are "substantial." Commentators to date have assumed that, because of the vast size of the Mormon Church, its Proposition 8 efforts cannot be substantial.²³ While exact financial information on the Mormon Church is not publicly available, estimates of its annual revenues are usually on the order of hundreds of millions, if not billions, of dollars.²⁴ Since the Church's direct expenditures were reportedly fairly limited, the Church could likely argue that its spending was well under the 5% or 10% thresholds in existing case-law.

This analysis rests on two important assumptions, both of them questionable. First, it is possible that the actual value of the Church's contributions is large, perhaps even exceeding the \$20 million spent directly by its members.²⁵ In the case of 501(h)-electing organizations, the IRS would compute the value of the organization's efforts by totaling the costs of preparing the lobbying communications, including a proportion of the organization's salary and other overhead costs, based on the time the charity's staff devoted to lobbying.²⁶ Considering that the Church's documented communications were relatively modest—a broadcast, a website, and the distribution of e-mail and phone lists—the allocable costs to the Church under this method would also be fairly small. It simply isn't very expensive to send a ten-minute e-mail.

Yet the difficulties with this approach are myriad. For one, it appears to omit entirely the costs of compiling the mail, e-mail and phone lists used to distribute the communication. But most of the costs and value in politi-

²¹ 26 C.F.R. 56.4911-2(c)(ii) (2008) (link).

²² 26 C.F.R. 56.4911-3(c)(3)(ii), (iii) (2008) (link).

²³ Janet I. Tu, *Mormon Church's Role in Prop. 8 Fight Debated; Gay-Rights Advocates Feel Church-State Line Crossed; Experts: Church Within Its Rights to Support Gay-Marriage Ban*, SEATTLE TIMES, Nov. 14, 2008, at A12 (quoting Charles Haynes, Senior Scholar, First Amendment Center) (link); Posting of John D. Columbo to Nonprofit Law Prof Blog, <http://lawprofessors.typepad.com/nonprofit/2008/11/lds-church-prop.html> (Nov. 18, 2008) (link).

²⁴ RICHARD OSTLING & JOAN K. OSTLING, *MORMON AMERICA: THE POWER AND THE PROMISE* xvi (1999).

²⁵ To be clear, I do not argue that there is any legal basis for attributing all of these donations to the Church; press accounts are that the money was given by members, not the organization itself.

²⁶ See 26 C.F.R. 56.4911-3 (2008). There is no current guidance on how the IRS would compute such expenditures for nonelecting organizations.

cal communications are precisely located in the task of identifying accurately those who would be most receptive to the message.²⁷

Relatedly, a church's communication with its members is likely to carry far more weight than a similar message from an unrelated party to the same group. In commercial terms, the church has an established store of goodwill, which in a market setting would command a high premium. A more economically accurate method of valuing the communication would be the price the charity could obtain for renting out its services (including its endorsement) to an unrelated outsider. In this instance, that figure might have been quite large. While such transactions have been rare among churches, universities, and other charities now commonly contract with private firms to sell their implicit endorsement to members, as with so-called "affinity" credit cards.²⁸ Those deals might provide at least a baseline for comparison for the value of church political efforts.

We do not know, however, how courts would resolve this valuation dilemma. The 501(h) rules by their terms do not apply to churches,²⁹ and the holes I have just outlined suggest that their power to persuade by analogy should be limited. Perhaps the most viable approach would be to employ something like the 501(h) valuation rules, but to recognize that they fail to account for a substantial amount of the value added by nonprofit lobbyists. Thus, the 501(h) number alone should not determine whether a charity has exceeded 10% or some other threshold; instead, the court should weigh both the 501(h) total and the other factors I have mentioned. Admittedly, this approach would create a fair deal of uncertainty, but most of the uncertainty would fall on large, established charities, whose vast member lists and accumulated goodwill would be most subject to valuation questions. Those organizations likely have the institutional capacity to consult experts and plan accordingly.

III. IS "SUBSTANTIALITY" A MEANINGFUL LIMIT FOR LARGE CHARITIES?

The second assumption behind commentators' conclusion that the LDS expenditures are unproblematic is that there is no meaningful limit on how high lobbying expenses can rise, so long as they remain approximately 10% of the charity's revenues. The implication is that a sufficiently large entity

²⁷ On the difficulty of separating the value of current participation from past organization-building, see Benjamin M. Leff, "Sit Down and Count the Cost": A Framework for Constitutionally Enforcing the 501(c)(3) Campaign Intervention Ban (Aug. 12, 2008) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1221163 (link).

²⁸ See generally Kevin M. Yamamoto, *Taxing Income from Mailing Lists and Affinity Credit Cards: A Proposal*, 38 SAN DIEGO L. REV. 221, 282–95 (2001), available at <http://ssrn.com/abstract=981067> (link).

²⁹ I.R.C. § 501(h)(5) (2006).

could spend billions of dollars without violating the prohibition against “substantial” lobbying efforts.

That view seems to strain the plain meaning of “substantial.” It is hard to believe that a charity could outspend its opponents by a large margin and still have engaged in insubstantial lobbying.³⁰ Nor is it clear why charities with large budgets should be free to exert political influence while small charities are condemned to be ineffectual. At best, it seems the statutory language is ambiguous between meaning “substantial” in relation to the size of the organization and “substantial” in an expenditure’s effects on political outcomes. Therefore, we likely must consider the purposes behind the lobbying ban in order to interpret its scope.

While Congress has not been explicit about its goals in enacting the limit on lobbying,³¹ we might infer its views from the structure of the statute. Notably, § 501(h) caps permissible contributions at \$1 million, regardless of the size of the organization. The implication is that some expenditures are too large to be permitted, no matter the size of the organization.³²

Admittedly, it could be argued in response that § 501(h) is intended to serve as a “safe harbor” provision to provide certainty in an uncertain field, and thus that there should be little negative inference that amounts above the safe harbor are impermissible. But, even if so, the design of the safe harbor still sheds some light on Congress’ view about the correct interpretation of § 501(c)(3). If (c)(3) offers an opportunity for massive expenditures by massive organizations, then the § 501(h) safe harbor is useless for just

³⁰ Moreover, that outcome seems in tension with the view of the charitable sector as a source of “diversity” and counter-majoritarian opinion. See David E. Pozen, *Remapping the Charitable Deduction*, 39 CONN. L. REV. 531, 564–67 (2006), available at <http://ssrn.com/abstract=900061> (surveying the diversity-rationale literature) (link). That is, charity is supposed to be an alternative to political power, not a tool for achieving it.

³¹ Earlier experts who have surveyed the “muddled” legislative history have concluded that the ban seems to have been aimed at preventing tax-deductible dollars from being used to further the private legislative purposes of the charity’s insiders. See, e.g., George Cooper, *The Tax Treatment of Business Grassroots Lobbying: Defining and Attaining the Public Policy Objectives*, 68 COLUM. L. REV. 801, 817 (1968). The provision was written broadly because of the difficulty of crafting more precise language, and fear that as a result those charged with enforcing it would find to be “private” and prohibited only those policies with which they disagreed. See *id.* at 817 & n.84; Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 23 (2003), available at <http://ssrn.com/abstract=534802> (link).

³² While churches cannot make a 501(h) election, there is no evidence that Congress intended for churches, but not other organizations, to make very large lobbying expenditures. For example, the omission of churches from the safe harbor provision could be read as a signal that Congress did not want to encourage any lobbying expenditures by religious organizations. On the other hand, religious organizations themselves lobbied for exclusion from 501(h), see Reka P. Hoff, *The Financial Accountability of Churches for Federal Income Tax Purposes: Establishment or Free Exercise?*, 11 VA. TAX REV. 71, 90 n.97 (1991), which might undercut any inference about Congressional intent to discourage lobbying by churches. It is, however, also possible that a scheme permitting only churches to lobby with little limit would violate the Establishment Clause.

those organizations that are most in need of assurance—those that invest a large sum in lobbying. Either Congress did not believe that such large expenditures were permissible under the “substantial” standard, or it did not want to encourage large expenditures by offering safe harbor to them. Either way, § 501(h) undermines somewhat the unlimited reading of “substantial.”

Turning to academic theories, commentators have offered two main justifications for the lobbying limits. For one, the lobbying limits mitigate the impact of wealth on the political process. Charitable contribution deductions are more valuable (and economically more feasible) for high-income taxpayers, so that permitting entities that receive deductible donations to lobby would give disproportionate voice to rich contributors.³³ Second, lobbying restrictions help to preserve charity as a separate sphere from government.³⁴ When charity is a political player, government has incentives to manipulate the charitable sphere, to capture or blunt charitable influence. Both of these rationales are controversial,³⁵ but to date they offer the best principled explanations for the current statutory scheme.

The wealth rationale clearly would condemn big spending by big organizations. Indeed, under the wealth rationale one might expect that there should be no permissible lobbying because any amount of lobbying would run the risk of distorting the political process. But perhaps a *de minimis* exception makes sense in a world in which it may be difficult to distinguish between impermissible lobbying and permissible charitable activity.

It could be argued that the wealth rationale is incoherent in that the Tax Code appears to permit other lobbying expenditures to be deductible, such as some dues paid by corporate members of business leagues, which are in turn permitted to lobby.³⁶ At best, though, this reduces the second layer of tax on business entities; it does not directly reduce the tax paid by individual shareholders. Thus, shareholders who use their corporation for lobbying purposes generally cannot come out ahead of other nonshareholders. There have been some proposals to permit (c)(3) organizations to lobby using

³³ See Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1406 (1988); Gregg D. Polsky, *A Tax Lawyer's Perspective on Section 527 Organizations*, 28 CARDOZO L. REV. 1773, 1776–78 (2007), available at <http://ssrn.com/abstract=932104> (link).

³⁴ See Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)'s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1320–41 (2007), available at <http://ssrn.com/abstract=947905> (link).

³⁵ See, e.g., Johnny Rex Buckles, *Is the Ban on Participation in Political Campaigns by Charities Essential to Their Vitality and Democracy? A Reply to Professor Tobin*, 42 U. RICH. L. REV. 1057 (2008), available at <http://ssrn.com/abstract=1021601> (link); Jeff Strnad, *The Charitable Contribution Deduction: A Politico-Economic Analysis*, in *THE ECONOMICS OF NONPROFIT INSTITUTIONS* 265, 266 (Susan Rose-Ackerman ed., 1986).

³⁶ Cf. Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activity*, 71 TEX. L. REV. 1269, 1286–1305 (1993) (making this argument against a possible “neutrality” rationale for the lobbying limits). Lobbying expenses are not otherwise deductible. I.R.C. § 162(e) (2006) (link).

nondeductible funds,³⁷ but none of these to date has dealt persuasively with the question of how to value the goodwill and economies of scale built up by the charity with deductible dollars.

The separate spheres rationale, too, looks to be inconsistent with a boundless reading of “substantial.” The relevant factor under that rationale should be whether or not a charity’s activities are important enough to tempt government officials to meddle with the charity’s affairs. Expenditures large enough to tip an election are bound to draw attention from governmental actors, regardless of the size of the organization. True, large charities may be more difficult for government to influence, but that might simply increase the size of the temptations, threats, or whatnot the officials offer to the charity.³⁸

CONCLUSION

Under existing precedent, the outcome of any challenge to the LDS Church’s intervention in Proposition 8 is uncertain. Most caselaw has looked to the cost, and perhaps time and effort, devoted to lobbying, and compared that to the organization’s overall size. By that standard, the Church’s vast size likely shields it from any serious threat of revocation. But that method has serious problems. It fails to consider the true economic value of political endorsements by influential organizations with extensive and time-tested lists of phone numbers and e-mail addresses. And more importantly, it neglects the fact that under either of the most persuasive explanations for the very existence of the lobbying limits, it makes no sense to permit multi-million dollar expenditures simply because a charity itself is large.

Even under my proposed methodology, the outcome of any challenge to the Church’s exemption is hard to predict. We do not know how the market would value the use of the Church’s mailing lists nor do we know the value of the staff time and other costs the Church invested. Perhaps these sums are modest, even in absolute terms. My point here is only that if these figures prove to be large—several million dollars, say—then there ought to be a serious question whether revocation is appropriate. The fact

³⁷ See Leff, *supra* note 27; Richard Schmalbeck, 501(say)(what?): Considering a New Exempt Category for Churches 15 (May 22, 2008) (unpublished manuscript on file with author).

³⁸ A third possible rationale, akin to the separate spheres argument, could be to prevent the management of a nonprofit from being distracted from its primary mission. Cf. Ellen P. Aprill, *Lessons from the UBIT Debate*, 45 TAX NOTES 1105, 1108 (1989) (making this point about rule against substantial commercial activity). On this logic, it might seem that the correct measure of “substantial” is the time and attention of the organization’s staff. But, as I argue in the main text, politically influential lobbying poses the danger that it will prompt outside responses that will themselves drive the charity to distraction. As a result, the best rule is probably one that makes the percentage of organizational effort a necessary but not sufficient touchstone for permissible lobbying; the organization must both maintain its focus on charity and also avoid major influence on political outcomes.

that several million dollars is a tiny fraction of the Church's budget should not by itself render the expenditure permissible.³⁹

³⁹ In addition, my conclusion that the Church's activities could potentially merit revocation of the Church's exemption does not necessarily mean that the IRS should pursue revocation as a matter of prosecutorial discretion. For one, my interpretation is somewhat novel, and it is likely unfair to apply a dramatic new limitation in a context bearing immense penalties. In addition, there is a reasonable question whether revocation would be consistent with the Religious Freedom Restoration Act, which requires the federal government to avoid imposing undue burdens on religious organizations. *See Branch Ministries v. Rossotti*, 211 F.3d 137, 142–44 (D.C. Cir. 2000) (rejecting argument that RFRA barred IRS revocation of church's exemption for intervention in political campaign) (link). I leave resolution of those hard questions to others more expert in them.